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No. 95-1136

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREGORY MURRAY,

Petitioner,

v.

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), a labor organization, and MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), a labor organization,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court and the court of appeals correctly hold that the Union breached no duty of fair representation where:

(a) The Union interpreted its collective bargaining agreement as not requiring two simultaneous notices of arbitration, to both the employer and the arbitrator;

(b) The collective bargaining agreement provided that "either party" could submit the notice to the arbitrator;

(c) The contract established no deadline for the submission of the notice to the arbitrator;

(d) The employer had always historically notified the arbitrator;

(e) The Union had rational reasons for not simultaneously notifying the arbitrator; and

(f) An arbitrator subsequently agreed that the Union was not contractually required to simultaneously provide notice to the arbitrator?

2. Whether this Court should abandon the duty of fair representation legal standard established in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991).

PARTIES TO THE PROCEEDINGS

Respondents would note that the complaint asserted no claim against Respondent Michigan AFSCME Council 25 (AFL-CIO) ("Council 25"). However, as argued below, the same undisputed facts and established law which supported the court of appeals' decision affirming summary judgment for Respondent Detroit Riverview Hospital Workers Local 2435, AFSCME, would also have supported summary judgment and its affirmance in favor of Council 25 had the same claim been pleaded against it.

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BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

1. Nature Of The Case

Petitioner Gregory Murray ("Murray") asserted two employment-related claims in this case. First, as to Respondent Detroit Riverview Hospital and Detroit-Macomb Hospital Corporation ("Hospital") Murray alleged that the Hospital had violated its collective bargaining agreement when it discharged Murray from employment. Record ("R") 1. Second, as to Respondent Detroit Riverview Hospital Workers Local 2435, American Federation of State, County and Municipal Employees (AFL-CIO)

("Local 2435"), Muray claimed that Local 2435 had violated its duty of fair representation because, following its long standing and consistent contract interpretation, it did not simultaneously notify an arbitrator of its intent to arbitrate this grievance when it filed its notice with the Hospital. R 1.

Although Murray's First Amended Complaint did not assert any claim against Respondent Michigan AFSCME Council 25 ("Council 25"), the same undisputed facts and established law which supported summary judgment for Local 2435 would have also supported summary judgment for Council 25 had the same claim been pleaded against Council 25.[1]

2. The Facts Of The Case

Plaintiff Gregory Murray was employed by the Hospital until his April 1, 1991 discharge. R. 1, ¶ 6. Asserting that Murray had left its emergency room unattended, the Hospital discharged him on April 1, 1991 by telephone and telegram. R. 1; R. 14; R. 27.

On April 5, 1991 Local 2435 filed a grievance on behalf of Murray, seeking his reinstatement with back pay. R. 1, ¶ 10; R. 14; R. 27. On April 11, 1991 the Union and the Hospital discussed Murray's grievance at Step 4 of the contractual procedure. On April 19, 1991 the Employer rejected the grievance at Step 4. R. 14; R. 27. On May 1, 1991 Local 2435 appealed Murray's grievance to Step 5, timely notifying the Hospital of its intent to arbitrate this grievance and naming Arbitrator Joseph Girolamo. R. 1, ¶ 11; R. 14; R. 27.

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[1] Although the Petition argues two other fair representation claims, they were *not* pleaded in the complaint. One, related to the filing of an unfair labor practice charge, was, rather, the subject of Murray's motion for leave to file second amended complaint. That motion was denied. The other, related to evidence presented at Murray's arbitration, was neither claimed in a complaint nor the subject of a motion to amend.

Under its long-standing procedure, whenever Local 2435 notified the Employer of its intent to arbitrate, it also submitted the grievance to its affiliated organization, Council 25, for internal review and approval. (If Council 25 approved a grievance for arbitration, it assumed all arbitration costs.) Council 25 subsequently approved Murray's arbitration, informed the Hospital and notified Arbitrator Girolamo that he had been selected. On May 28, 1991 Arbitrator Girolamo offered available hearing dates in June, August and September, 1991. R. 14; R. 27.

Shortly thereafter, James Neblett, a Council 25 representative, received a June 11, 1991 letter from the Hospital on another grievance, that of Darlene Baker, which was also pending at the arbitration step. R. 27. The Hospital refused to arbitrate Baker's grievance on the ground that the Baker's step 5 arbitration appeal had not been simultaneously delivered to both an arbitrator and the Hospital. *Id.* R. 14; R. 27.

In the face of the Employer's refusal to arbitrate these grievances, AFSCME prepared an unfair labor practice charge that it intended to file with the National Labor Relations Board ("NLRB"). R. 10; JA at 328.[2] This charge was, however, inadvertently filed with the Michigan Employment Relations Commission ("MERC")—the NLRB's public sector counterpart in the State of Michigan. *Id.* Notwithstanding MERC's subsequent dismissal of the unfair labor practice charge, AFSCME did ultimately obtain the Hospital's agreement to arbitrate the three pending cases: Murray's grievance, Darlene Baker's grievance and a third grievance for an employee by the name of Regina Shorter. R. 14; R. 27. The parties

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[2] By stipulation, the parties agreed to use all discovery in *Baker v. Detroit Riverview Hospital*, 834 F.Supp. 216 (E.D. Mich. 1993), *aff'd*, Docket No. 94-2426 (6th Cir. 1995), including the Deposition of James Neblett, referenced here to the Joint Appendix ("JA") filed below.

agreed that the arbitrator in each of the three cases would decide the procedural issue raised by the Hospital, namely, whether AFSCME was contractually obligated to simultaneously notify both the Employer and the arbitrator at Step 5 of the procedure.

The first grievance to be decided was the grievance of Regina Shorter. On April 2, 1992 Arbitrator William Daniel *agreed with* AFSCME that the contract did *not* require simultaneous dual notification. R. 14; R. 27; JA 66. While Arbitrator Daniel found that it was the Union's responsibility to notify the arbitrator, he specifically ruled that the notification to the arbitrator need *not* be simultaneous with the notification to the employer. Arbitrator Paul Glendon issued his decision on the Baker grievance on April 18, 1992. R. 14; R. 27; JA 76. He took the opposite view and adopted the Hospital's "dual notice" contract interpretation. In the third decision in this series, on Murray's grievance, Arbitrator Elaine Frost elected on February 11, 1993 to follow the views of Arbitrator Glendon. R. 14; R. 27; JA 56. Unlike Arbitrator Daniel, Arbitrator Frost decided dual notification was necessary.

3. The Proceedings Below

Murray initially filed suit on August 11, 1993, with a First Amended Complaint following on August 16, 1993.

On October 8 and 15, 1993 Respondents asked that Murray voluntarily dismiss the complaint, particularly in light of the previous decision in the virtually identical matter of *Darlene Baker v. Detroit Riverview Hospital, et al., supra.* Murray declined, but proposed that the parties stay discovery and file cross motions for summary judgment. R. 10; R. 18. Respondents accepted Murray's proposal. The subsequent Order to Hold Discovery in Abeyance and for Filing of Cross Motions for Summary Judgment required that cross motions be filed on or before Monday, December 13, 1993. R. 10.

On Friday, December 10, 1993, the afternoon of the last business day before motions were due, Murray unsuccessfully sought the Respondents' concurrence in a second amended complaint. R. 18, p. 2. The parties filed their respective cross motions for summary judgment by the following business day, Monday, December 13, 1993. R. 11, 13, 14. Murray also served a Motion to File Second Amended Complaint. R. 15. The Order Granting Defendants' Motions to Dismiss and for Summary Judgment and Denying Plaintiff's Cross-Motion for Summary Judgment and the Order Denying Plaintiff's Motion to File Second Amended Complaint were both entered on January 31, 1994. R. 30, 31.

Murray filed his notice of appeal on February 14, 1994. R. 34. The United States Court of Appeals for the Sixth Circuit filed its decision affirming the district court on August 29, 1995. On or about September 11, 1995 Murray filed a Motion for Extension of Time to File Petition for Rehearing *En Banc*, which was granted. Murray then filed a Petition for Hearing and Suggestion for *En Banc* on or about September 14, 1995. The court of appeals filed its Order Denying Petition for Hearing *En Banc* on September 17, 1995. Murray filed this Petition on January 16, 1996.

REASONS FOR DENYING THE WRIT

I. MURRAY HAS DEMONSTRATED NO REASON TO GRANT THIS PETITION.

As spelled out in Rules of the United States Supreme Court, "a petition for a writ of certiorari will be granted only for compelling reasons". Rule 10. Murray has presented no compelling reasons as to why this petition should be granted.

Although cast in terms of an alleged "conflict" among the circuits, as discussed in greater detail below, Murray has demonstrated no such conflict. Rather, both the district court and the court of appeals followed the law of

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991).

Nor would there be any conceivable basis for granting certiorari because of any alleged "misapplication" of established law to the facts of this case. As also discussed below, the record amply supported the district court and the court of appeals' rulings. Rather, it is Petitioner who continues to rely upon allegations not of record and, in fact, contrary to the record. For example, the Petition characterizes this as a matter that arose out of Petitioner's "discharge from employment and the discharge of two other union stewards one month before his own discharge". Petition ("P") at 2. In fact, the complaint made no reference to the discharge of anyone else. R. 1. This reformulation of Petitioner's claim is revisionist and unsupported by the record.

Similarly, Petitioner repeatedly claims that the Union had withdrawn previous grievances from arbitration because of the Employer's procedural objections. However, as both the district court and the court of appeals correctly noted, Petitioner provided absolutely no evidentiary support for that proposition. It is Petitioner, not the courts below, who has engaged in speculation about other grievances.

Petitioner also misstates the record when he characterizes the collective bargaining agreement as containing "a contractual deadline" for the notification to the arbitrator. Petition at 15. In fact, it was undisputed below that while every other step of the grievance procedure was governed by an articulated specific deadline, *no* such deadline was recited with respect to the notification to the arbitrator.

Petitioner also mischaracterizes the record below when he claims that all three arbitrators rejected the Union's contract interpretation. P. 5. In fact, Arbitrator Daniel *agreed* that the contract did *not* establish any specific

deadline for notification to the arbitrator. Expressly rejecting the notion of simultaneous dual submissions, Arbitrator Daniel interpreted the contract as providing the Union with a "reasonable period of time within which" to notify the arbitrator. JA 74.

Petitioner apparently continues to hope that an accumulation of mischaracterizations of the record will win his case for him. They have not done so thus far and do not support this petition for writ of certiorari now.

II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY FOUND THAT ON THE UNDISPUTED MATERIAL FACTS, AFSCME DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION.

As noted above, Murray presented only one claim against the Union below. Murray asserted that Local 2435 "breached the duty of fair representation that it owed the Plaintiff by failing to provide the arbitrator with timely notice of its appeal to arbitration." R. 1, ¶ 32-34. In other words, Murray claimed that Local 2435 breached its duty by interpreting its contract as not requiring two simultaneous notices—one to the Hospital and the other to the arbitrator. (It had always been undisputed that the Local gave the Hospital a timely notice of intent to arbitrate.) On the undisputed material facts, the district court and court of appeals correctly found that AFSCME's contract interpretation was within its wide range of reasonableness.

A. Murray's "Historical" Allegations Were Unsupported In The Record.

Both courts below correctly rejected Murray's so-called "historical" allegations about prior grievances because they were entirely unsupported by the record. Rule 56(e) of the Federal Rules of Civil Procedures requires parties to present "such as facts as would be admissible in evidence" and that their affidavits "shall show affirmatively

that the affiant is competent to testify to the matters stated therein."

Completely disregarding the requirements of Rule 56(e), Murray made and continues to make sweeping statements about other grievances. Because none of these allegations was supported as required by Rule 56, they were and remained entitled to no consideration whatsoever.

B. The District Court and Court of Appeals Correctly Determined That The Union's Contract Interpretation Was Within Its Wide Range Of Discretion.

1. *The Contract Did Not Say That AFSCME Had To Submit Two Simultaneous Dual Notifications.*

As also noted by the courts below, an analysis of AFSCME's contract interpretation must start with the contract language itself. As all three of the arbitrators ultimately noted, the contract did not state that AFSCME had to notify the arbitrator of his or her selection. Rather, it said "either party" could. This stands in contrast to other contract clauses which expressly impose specific duties on specific parties.

For example, at step 1, the contract requires that "the employee and his immediate supervisor should discuss the grievance." The obligation is plain and the responsible individuals are identified. R. 11; JA 38. Similarly, at step 2 the contract says that the grievance "shall be placed in writing by the group steward and signed by the employee." JA 39. Again, the obligation and the responsible persons are indentified. The contract also requires that the written grievance "be presented by the employees" group steward to the employees' department head." *Id.* Again, both the obligation and the person are specified. At step 3 the contract requires that "written notice . . . be given by the chairperson to the grievance committee or his designee to the personnel director of the hospital." JA 40. Similarly, at step 4 the contract

specifies that "the chairperson of the grievance committee or his designee shall file" the grievance. *Id.*

In contrast, at step 5 the contract states that "*either party* may give notice to the other party of its intent o arbitrate such grievance." (Emphasis added.) JA 41. Even more significantly, after requiring that notice of intent to arbitrate "*shall be given* within 14 calendar days," the contract provides that "upon filing of a demand for arbitration, *it shall be submitted* to an arbitrator selected on a rotation basis from the jointly agreed upon list." *Id.* (Emphasis added.) The contract does not say that "the union must" submit the grievance to the arbitrator. It does not say that "the union shall." Rather, the contract says, "it shall be submitted."

Thus, AFSCME's contract analysis was rational because the contract did not state what the Hospital claimed. In contrast to all other grievance clauses, it did not state that the Union had sole responsibility for notifying the arbitrator. This gap in the Hospital's contract interpretation argument was explicitly noted by both Arbitrators Frost and Daniel. Arbitrator Elaine Frost said "Neither of the questions raised is answered by the express contract language." JA 56, p. 7. Arbitrator Daniel also noted that the contract did not say what the Hospital claimed. "Because the contract does not say that exactly, the arbitrator must consider all of the facts and circumstances to determine if [the Employer's view] . . . is a fair and reasonable interpretation of the contract." JA 66 at 7.

Given the fact that the contract did not say what the Hospital claimed, the courts below correctly held that AFSCME's contract interpretation and conduct were well within its range of discretion.

2. *AFSCME Correctly Believed That The Hospital Had An Economic Interest In Notifying The Arbitrator.*

AFSCME's contract interpretation was also rational because it fit the parties' circumstances. Once the Union gave notice of its intent to arbitrate, the Hospital not only had the right to notify the arbitrator ("either party") but, more important, it was in the Hospital's economic interest to notify the arbitrator. After all, the sooner the grievance was submitted to an arbitrator, the more quickly the arbitration award would issue. Under the terms of the contract "the arbitrator shall schedule and hold a hearing within 90 calendar days from the date the arbitrator was notified of the assignment and the arbitrator shall submit a decision within 30 calendar days following the hearing." JA 41. The more quickly a decision issued, the sooner the Hospital would know whether it had to reinstate an employee and the sooner it would be able to limit its back pay liability. From an economic view, it behooved the Employer to "flip the switch" and submit the case to the arbitrator as soon as it received the Union's arbitration notice. This analysis, as the courts below agreed, was rational.

3. *AFSCME Satisfied The Contract's Requirement That The Grievance Be Moved From One Step To The Next.*

AFSCME's analysis was also rational because the contract did not support the Hospital's argument that arbitration was forfeited if the arbitrator had not been simultaneously notified. The contract only provided for resolution if a grievance was not appealed from one step to the next: "If not moved from one step to the next by the local union, it shall be considered settled at the last answer by the hospital." JA 37.

Thus, under the express language of the contract, once AFSCME gave the Hospital notice of arbitration within the 14 days required by the contract, it had moved the grievance from step 4 to step 5. The contract, contrary

to the Hospital's claims, contained no similar "resolution" language in connection with notice to the arbitrator.

4. *The Contract Imposed No Time Limit For Notice To The Arbitrator.*

Moreover, AFSCME's contract interpretation was rational because the contract contained *no time limit for submission to the arbitrator.* As both Arbitrator Frost and Arbitrator Daniel noted, there was no separate contract provision specifying time limits for submission to the arbitrator. The only contractual time limit was established for giving notice of intent to arbitrate to the Hospital within 14 days. And, as Petitioner concedes, it is undisputed that AFSCME timely submitted this notice of intent to arbitrate to the Hospital.

5. *The Contract Language Was New.*

In addiion, AFSCME was interpreting new contract language. Although the Hospital and AFSCME had had some differences of opinion about the meaning of the collective bargaining agreement, the language had never been interpreted by any third party and had never been arbitrated prior to Murray's discharge. At the time AFSCME was processing Murray's grievance, there were no arbitral pronouncements about the contract's meaning. In interpreting the contract, AFSCME relied upon the actual contract language, AFSCME's intent in bargaining it, the parties' circumstances and the parties' past history.[3] It was then up to each side to form a judgment about its obligations. The courts below did not err in finding this

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[3] As both James Neblett and Ken Witherspoon testified at their depositions in the virtually identical *Baker v. Detroit Riverview Hospital* case, AFSCME had *never* undertaken responsibility for notifying the arbitrator of his selection. R. 10, Stipulation; Neblett Dep. p. 31; Witherspoon Dep. p. 17 (both from *Baker* record.) As James Neblett further noted in his affidavit, it was historically the Hospital who had identified arbitrators on the rotating selection list, who reserved facilities at the hospital for meetings and who scheduled the hearing and the rooms. R. 14; R. 27, ¶ 5, 11, 13.

approach to be within the wide range of reasonableness accorded to AFSCME.

6. *AFSCME's Intent And Strategies Supported Its Contract Interpretation.*

As also established below, AFSCME's bargaining intent and strategy supported its contract interpretation. It had been Local 2435's practice to automatically send the Hospital a notice of intent to arbitrate on all discharge cases, regardless of their merits. R. 14; JA 128, ¶ 5. In that way, the cases would be preserved for arbitration pending Council 25's review and assessment of them. The process then gave Council 25 some time to investigate the merits of the discharge case and to determine whether or not it should proceed to arbitration. *Id.*

While the Union acknowledged that discharge cases were subject to expedited arbitration, contractually that meant that a decision had to issue within 120 days of arbitrator notification. Because it was Council 25's desire to have sufficient time to investigate the merits of the case and because it was in the Hospital's interest to force a quick arbitration with limited back pay, it was logically up to the Hospital to get the case scheduled, thereby forcing Council 25's hand and limiting the Hospital's back pay exposure.

This was not, then, a situation where a union failed to check the language of the contract. Nor was it a situation where a union failed to notice what the contract said. Rather, in this instance, the Union knew precisely what the contract said and formed an opinion as to its meaning based on the contract language, history, its intent and logic.

The question below was not whether a court would have interpreted the contract language differently. The question was not whether the Hospital ultimately had the better contractual argument. Rather, the question is whether the Union's contract interpretation was outside the wide range of reasonableness accorded to unions under

the law of *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). On the undisputed facts, the district court and the court of appeals correctly found that the written contract language, the parties' history and the Union's intent and strategies amply supported Local 2435's contract interpretation. Its conduct was not a breach of the duty of fair representation.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MURRAY'S MOTION TO FILE A SECOND AMENDED COMPLAINT.

A. An Amendment Is Properly Denied Where It Would Have Been Futile.

1. *The Amendment Would Have Failed To State A Claim.*

Where a proposed amendment is legally deficient on its face, the court may properly deny the motion to amend. *Banque de Depots v. National Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974). Or, to put it another way, if an amended claim could not withstand a motion to dismiss, it need not be permitted. *Neighborhood Development Corp. v. Advisory Council and Historic Preservation Department HUD, City of Louisville*, 632 F.2d 21, 22 (6th Cir. 1980).

Murray's proposed amendment was properly denied because it would have been legally deficient and subject to immediate dismissal. As a matter of law, and, on the undisputed facts, Murray's argument concerning the filing of the unfair labor practice charge did not state a claim.

As previously discussed, the Hospital initially took the position that because Local 2435 had not provided an arbitrator with a dual simultaneous notice, the Hospital would refuse to arbitrate Murray's and two other grievances. In order to obtain arbitration of these grievances,

the Union prepared an unfair labor practice charge that it intended to file with the National Labor Relations Board. It was, however, inadvertently filed with the Michigan Employment Relations Commission. R. 10; JA 328. As Murray concedes, the Hospital nonetheless subsequently agreed to arbitrate all three grievances.

On these undisputed facts, the court correctly found that Murray's reformulated duty of fair representation count would not state a claim as a matter of law. The unfair labor practice charge was part of a strategy to compel the Hospital to arbitrate Murray's grievance. Once the Hospital agreed to arbitrate, there was no need for the charge. Murray's proposed amendment to assert that the alleged "misfiling" of the unfair labor practice charge constituted a breach of the duty of fair representation would have been deficient as a matter of law.

2. *The Claim Would, In Any Event, Have Been Entirely Time Barred.*

Murray alternatively sought to argue that AFSCME breached its duty because his opportunity to file his own unfair labor practice charge was lost. Murray claimed that he was deprived of this opportunity because AFSCME allegedly did not tell him of the dismissal of the charge until after his six months to go to the NLRB had expired on October 1, 1991. He claimed that AFSCME's alleged failure to advise him of the dismissal of the unfair labor practice charge prior to October 1, 1991 constituted a breach of the duty of fair representation.

Yet, Murray conceded below that on November 6, 1991 he learned that the unfair labor practice charge had been dismissed for lack of MERC jurisdiction. "I first heard that the unfair labor practice charges were dismissed for lack of jurisdiction from Ms. Darlene Baker, at a union meeting following the unexplained cancellation of the MERC hearing, on November 6, 1991". R. 13; JA 118,

Assuming arguendo that AFSCME's failure to file in the correct forum and its failure to so inform him prior to October 1, 1991 constituted a breach, then Murray's claim accrued on November 6, 1991 when he learned that the charge had been dismissed. As of November 6, 1991 Murray had six months in which to claim that AFSCME breached a duty of fair representation in connection with the unfair labor practice charge. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

The complaint here was not filed until August 11, 1993, almost two years after Murray's November 1, 1991 discovery that the unfair labor practice charge had been dismissed for lack of jurisdiction. The amended complaint would have been time barred and, therefore, futile. As the court of appeals held, the district court was well within its discretion in denying Murray's motion to add this claim.

B. The Court Of Appeals Also Correctly Held That The Motion For Leave Was Also Properly Denied Because Of Resulting Prejudice To AFSCME.

Rule 15(a) of the Federal Rules of Civil Procedure provides that, while leave to amend shall be freely given, it may only be granted "when justice so requires." Even apart from its failure to state a claim and apart from being time barred, justice militated against permitting this proposed amendment. As previously noted, it was at Murray's own request that the parties entered into a stipulation to file cross motions for summary judgment. Murray's untimely motion to amend would have substantially prejudiced AFSCME in this proceeding.

That prejudice would have arisen, in part, from the fact that AFSCME had filed its motion for summary judgment pursuant to Murray's proposal. If Murray had been allowed to reformulate his theories, AFSCME would have had to incur the additional work of preparing an-

other motion for summary judgment. Moreover, this work would be unnecessary because, as discussed, the claim which Murray sought to present would be subject to immediate dismissal as failing to state a claim and untimely. It would have been contrary to justice to have allowed this amendment in the circumstances of this case.

IV. EVERY OTHER CIRCUIT COURT WOULD HAVE REACHED THE SAME CONCLUSION ON THE RECORD IN THIS CASE. THERE IS NO CONFLICT IN THE CIRCUITS.

After reviewing the record below, the court of appeals correctly held that the contract language supported the Union's interpretation of its collective bargaining agreement. While the contract expressly imposed specific deadlines on each and every step of the grievance procedure (deadlines which this Union met at each and every step in this case), the contract expressed no such specific deadline with respect to the notification to the Arbitrator. Nor did it explicitly require the Union to provide that simultaneous notice. The language of the collective bargaining agreement supported the court of appeals' conclusion that the Union's interpretation of its contract was a "sensible construction".

The court also correctly found that Local 2435's conduct was supported not only by the actual contract language, but also by its strategic concerns. As the record indicated below, it was in the Employer's interest that arbitration be expedited to minimize back pay liability. It was Local 2435's rational and well grounded strategic view that once it gave the 14-day notice of intent to the Employer (which it did in this case), the Employer was on notice of Local 2435's intent to arbitrate and was entitled under the contract language ("either party") to notify an arbitrator and thereby satisfy its goal of minimizing its back pay exposure. In contrast, Local 2435 did not want to immediately send the notice because it wanted to provide Council 25 time to review and approve

the grievance. This strategic concern, particularly when coupled with the actual contract language, AFSCME's intent and the parties' past history, placed Local 2435's conduct well within the wide range of reasonableness accorded to unions under this Court's historic standard.

The Sixth Circuit's analysis of the record and its conclusions of law were consistent with *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). This Court has repeatedly held that a union will not be deemed to have breached its duty of fair representation where it acts within its "wide range of reasonableness." *Ford Motor Co. v. Huffman*, 345 U.S. 330 at 338 (1953). The Sixth Circuit applied this well established law to the undisputed material facts of this case and correctly held that no breach occurred.

Petitioner has not demonstrated that any circuit court would have held otherwise. While he claims that the Tenth Circuit has endorsed a different standard of law, the case he cites, *Aguinaga v. United Food and Commercial Workers International Union*, 993 F.2d 1463 (10th Cir. 1993), embraces this Court's rule as most recently expressed in *Airline Pilots Ass'n Int'l v. O'Neill, supra.* It looked to see whether the union's activity had been "irrational in light of the surrounding climate". *Aguinaga*, 993 F.2d at 1471.

Petitioner also references the Seventh Circuit "abandonment" of bad faith or invidiousness as an element of the duty of fair representation. This is not surprising and establishes no conflict in the circuits either. It has long been clear that arbitrariness in and of itself can constitute a breach of the duty. *Vaca v. Sipes, supra.*

Petitioner then goes on to cite a series of Sixth Circuit decisions which he believes to be "inconsistent". Petition at 10, note 9. However, not only does he fail to demonstrate inconsistentcy, but—more important—the cases are

all from the Sixth Circuit. That hardly constitutes a conflict among the circuits.

What this Petition really does is ask this Court to rewrite the law on the duty of fair representation. There is, however, no need for such revisitation of well established law. As recently as *Airline Pilots Ass'n Int'l v. O'Neill, supra*, this Court has reaffirmed that unions breach their duty where their actions are arbitrary, discriminatory, or undertaken with hostility or in bad faith. It has long since been well established that each of these elements, standing alone or in combination with one another, constitutes a breach of the duty of fair representation. Petitioner has presented no reason why this well established standard should be disturbed.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Respondents Detroit Riverview Hospital Workers Local 2435, American Federation of State, County and Municipal Employees (AFL-CIO) and Michigan AFSCME Council 25 (AFL-CIO) respectfully ask that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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